



**Department of Energy  
Acquisition Regulation**

**No. 2002-04  
Date 07/09/02**

# **ACQUISITION LETTER**

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA.

**Subject: Processing Requests for Indemnification or  
Other Extraordinary Contractual Relief  
Under Pub. L. 85-804**

## **References:**

FAR Part 50	Extraordinary Contractual Actions
FAR Section 52.250-1	Indemnification Under Pub. L. 85-804
DEAR Subpart 950.1	General.

## **When is this Acquisition Letter (AL) Effective?**

This AL is effective 10 business days from the date of issuance.

## **When Does this AL Expire?**

This AL remains in effect until superseded or canceled.

## **Who is the Point of Contact?**

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202) 586-8264, or [Robert.Webb@pr.doe.gov](mailto:Robert.Webb@pr.doe.gov)

Visit our website at [www.pr.doe.gov](http://www.pr.doe.gov) for information on Acquisition Letters and other policy issues.

## **What is the Purpose of this AL?**

The purpose of this AL is to describe the process for the Department of Energy's coordination and approval in determining whether to provide a DOE contractor indemnification or other form of extraordinary contractual relief pursuant to Pub. L. 85-804.

## **What is the Background?**

Pub. L. 85-804 provides the President with broad authority to grant various forms of extraordinary contractual relief, where the relief would facilitate the national defense. That relief includes actions such as indemnification for unusually hazardous or nuclear risks or an increase of contract price without consideration.

Executive Order 10789 identifies the agencies to which this authority has been delegated and describes how this authority is to be implemented. The Department of Energy is one of those agencies.

The decision to grant extraordinary contractual relief, amounting to \$50,000 or less, to a DOE contractor rests with the DOE Procurement Executive and National Nuclear Security Administration (NNSA) Director of the Office of Procurement and Assistance Management (OPAM), for their respective organizations. The decision to grant relief in excess of that amount or any decision to grant indemnification against unusually hazardous or nuclear risks or to increase the contract or unit price without consideration may be made only by the Secretary of Energy.

In recent years, most requests for indemnification under Pub. L. 85-804 have related to nonproliferation, weapons reduction and other national security activities that have the potential for resulting in a nuclear incident outside the United States. DOE contractors have sought indemnification under Pub. L. 85-804 for these activities because the Price-Anderson Act (section 170d. of Atomic Energy Act of 1954, as amended) provides for indemnification for a nuclear incident outside the United States only when the nuclear material causing the incident is owned by the United States, and limits the amount of the indemnification for these incidents to \$100 million. In response to these requests, the Department has granted indemnification for the following types of activities:

1. Participation in the Department's Nuclear Energy Search Team, Accident Response Group, Crisis Response Team and other radiological emergency operations conducted outside the United States.
2. Maintenance and repair of nuclear weapons conducted outside the United States including the safe secure dismantlement of weapons in the former Soviet Union.

- 3.. Packaging and transportation of radioactive material outside the United States for non-proliferation purposes.
4. Modifying foreign nuclear material production reactors in order to reduce their capacity to produce weapons-grade material and improve their safety.
5. Non-proliferation activities in connection with nuclear weapons or weapons-usable material outside the United States, such as establishing a safeguard system to prevent diversion of weapons or weapons materials.
6. Assistance in the redesign of foreign research and test reactors so that they are capable of using low rather than high-enriched uranium and thus reduce the potential for the loss or diversion of high-enriched uranium.

Relief under Pub. L. 85-804 is not a routine contract action and should not be treated as such. The authority to grant this extraordinary contractual relief must be exercised with great caution. The grant of relief must be based on a sound and compelling justification. Speculation that the relief might be helpful is not sufficient. In requesting, reviewing and approving relief, careful consideration must be given to the extent to which the statutory and regulatory criteria are satisfied, the need for the relief, the consequences of not granting the relief, and the benefit to the Department and the United States in facilitating the national defense. Examination of these issues is especially important when the relief takes the form of an indemnification since such relief, in effect, transfers large and potentially unlimited liability to the United States.

A flow diagram that displays the processing of these requests as described in Sections I. through VI. is provided as an Attachment to this AL.

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**Guidance Included in this Acquisition Letter**

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**Attachment - Flow Diagram for Processing Request for Indemnification or Other form of Extraordinary Contractual Relief Under Pub. L. 85-804**

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**I. How is a Request for Indemnification or Other Form of Extraordinary Contractual Relief Made?**

A DOE contractor must submit any request for indemnification or for any other form of extraordinary contractual relief under Pub. L. 85-804 to the cognizant DOE contracting officer. The request must specify what relief is sought, what work is to be covered by the relief, why the relief is necessary and appropriate, and otherwise provide the information required at FAR 50.403-1 for requests for indemnification (FAR 50.303-1 for all other requests. For indemnification requests, the contractor must provide sufficient information to enable the contracting officer to determine that the criteria at FAR 50.403-2 are satisfied (See FAR 50.305 and 50.306 for all other requests).

**II. What are the responsibilities of the DOE Office receiving the request?**

The contracting officer receiving the request for indemnification must review the request and determine, after consultation with the cognizant DOE program official at the site and legal counsel, whether to recommend that the requested relief satisfies the criteria at FAR 50.403-2, is in the best interest of the United States, and would facilitate the national defense (See FAR 50.305 and 50.306 for all other requests). As part of this process, legal counsel may discuss the request with the the NNSA General Counsel for requests to NNSA, Assistant General Counsel for Procurement and Financial Assistance, and, in the case of a request for indemnification, with the Assistant General Counsel for Civilian Nuclear Programs.

If the contracting officer concludes the request for indemnification should be granted, he will prepare a file to support the granting of the request. That file must include a memorandum including his recommendation, a draft memorandum of decision to be signed by the approving official, a draft contract clause, and any other relevant supporting material. The recommendation by the contracting officer must demonstrate that the FAR criteria at 50.403-2 are satisfied, describe the relief to be granted and the scope of the relief (for example, the activities and persons to be covered), and explain that the requested relief is both necessary and appropriate to achieve the objectives of the Department (See FAR 50.305 and FAR 50.304 for all other requests).

If the request involves indemnification, the recommendation must also contain an evaluation of the risks. The draft contract clause must, to the extent practical, contain the same language as the clause set forth at FAR 52.250-1. If the request involves an indemnification, the draft clause must identify the work to be covered and exclude from its coverage liabilities already indemnified under the Price-Anderson Act.

The contracting officer has the discretion to extend an indemnification granted under Pub. L. 85-804 to domestic subcontractors and suppliers. That decision may be subsequent to the initial decision. The determination to extend the indemnification must be in writing and is appropriate only to the extent needed to achieve the objectives of the Department.

An indemnification under Pub. L. 85-804 may be extended to foreign subcontractors and suppliers only if explicitly approved in the initial Memorandum of Decision or in a subsequent Supplemental Memorandum of Decision by the Secretary.

Upon the concurrence of the Head of the Contracting Activity, the contracting officer shall forward the file to the Program Secretarial Official (PSO) having primary responsibility for the work covered by the request.

### **III. Who Champions the Request at Headquarters ?**

If the PSO concurs with the request, the PSO shall prepare an action memorandum recommending the request be approved and forward the memorandum and supporting documentation to the appropriate officials for review and approval in accordance with Sections IV and V of this AL.

### **IV. Who Reviews the Request?**

#### **A. For an NNSA contract?**

If a request requires Secretarial approval, the PSO must obtain concurrences of the General Counsel of NNSA, the NNSA Director, OPAM, and, in the case of a request for indemnification, the DOE Assistant General Counsel for Civilian Nuclear Programs prior to submission to the Secretary.

If Secretarial approval is not required, the PSO must obtain concurrences of the General Counsel of NNSA prior to submission to the NNSA Director, OPAM.

#### **B. For all other DOE contracts?**

If a request requires Secretarial approval, the PSO must obtain concurrences of the DOE Assistant General Counsel for Procurement and Financial Assistance, the DOE Procurement Executive and, in the case of a request for indemnification, the DOE Assistant General Counsel for Civilian Nuclear Programs prior to submission to the

Secretary.

If Secretarial approval is not required, the PSO must obtain the concurrence of the DOE Assistant General Counsel for Procurement and Financial Assistance prior to submission to the DOE Procurement Executive.

## **V. Who Approves the Request?**

**Only** the Secretary of Energy may approve granting the request for extraordinary contractual relief under Pub. L. 85-804 where the relief is: (1) valued in excess of \$50,000; (2) for indemnification of any value against unusually hazardous or nuclear risks; or (3) for any increase of the contract price or unit price without consideration. If Secretarial approval is required, the action memorandum recommending approval must be submitted through the DOE General Counsel.

Where the requested relief is estimated to total \$50,000 or less and Secretarial approval is not otherwise required, the NNSA Director, OPAM, is the approving authority for NNSA contracts, and the DOE Procurement Executive is the approving authority for all other contracts.

**NOTE:** After the decision is made, the PSO shall assure: (1) for NNSA contracts that copies of the supporting documentation, the recommendation of the PSO, the concurrences and the decision are provided to the DOE Procurement Executive and (2) for DOE contracts that copies of the supporting documentation, the recommendation of the PSO, the concurrences and the decision are provided to the NNSA Director, OPAM. This is in addition to the normal distribution to the contracting officer.

## **VI. How much time must be allotted to the review and approval processes?**

A DOE contractor must submit a request for relief under Pub. L. 85-804 at least 60 work days prior to the date on which relief will be effective if Secretarial approval is necessary, and, in all other cases, at least 40 work days prior to the date on which relief will be effective. If a contractor requests expedited relief, the request must contain a detailed discussion of the reasons why the request could not have been submitted in a timely manner and what adverse consequences, if any, will result in not granting the relief on an expedited basis.

The cognizant contracting officer may take no more than 20 work days to determine whether to forward a contractor's request for extraordinary contractual relief pursuant to Pub. L. 85-804. The contracting office must provide the request to the cognizant DOE program official and the legal counsel within 2 work days of receiving the request. The senior program official and the legal counsel must provide their views to the contracting officer within 15 work days of receiving the request.

A contracting officer must submit a recommendation to grant relief under Pub. L. 85-804 and related documents to the PSO at least 40 work days prior to the date on which relief will be effective, if Secretarial approval is necessary and, in all other cases, at least 20 work days prior to the date on which relief will be effective. If the contracting officer recommends expedited relief, the recommendation must contain a detailed discussion of the reasons why the recommendation could not have been submitted in a timely manner and what the adverse consequences, if any, will result from not granting the relief on an expedited basis.

If a PSO concurs with a recommendation from a contracting officer, the PSO must submit an action memorandum to the Secretary within 20 work days from the date on which the PSO received the recommendation or, if Secretarial approval is not required, submit an action memorandum to the NNSA Director, OPAM, or the DOE Procurement Executive within 15 work days from the date on which the PSO received the recommendation. A PSO must provide an action memorandum and related documents to concurring officials within 5 work days from receiving a recommendation. A concurring official must concur or non-concur on an action memorandum to the Secretary within 10 work days of receiving the action memorandum or on an action memorandum to the NNSA Director, OPAM, or the DOE Procurement Executive within 5 work days of receiving the action memorandum. If the action memorandum recommends that the Secretary grant relief sooner than 40 work days from the date on which the PSO received the recommendation or if the action memorandum recommends the NNSA Director, OPAM, or the DOE Procurement Executive grant relief sooner than 20 work days from the date on which the PSO received the recommendation, the action memorandum must contain a detailed discussion of the reasons why the action memorandum could not have been submitted in a timely manner and what adverse consequences, if any, will result from not granting the relief on an expedited basis.

**Flow Chart for Processing Requests for Extraordinary Contractual Relief Pursuant to Pub. L. 85-804**

